IN THE SUPREME COURT OF FLORIDA

REGINALD WINGFIELD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC00-250

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case with the following additions and corrections:

The offenses with which Petitioner was charged were alleged to have been committed on May 26, 1998 (V 1 R 18-20). Count 6 of the information filed against Petitioner charged malicious damage to a motor vehicle belonging to the Tampa Police Department in the amount of more than $1000 (V 1 R 20). At the close of the State's case, Petitioner moved for judgment of acquittal on the aggravated battery on a law enforcement officer (counts 2 and 3), battery (count 8, or count 7 after the aggravated assault count, originally count 5, was nol prossed), obstructing or opposing an officer with violence (count 7, or count 6 after the aggravated assault count was nol prossed), and felony criminal mischief (count 6, or count 5 after the aggravated assault count was nol prossed) charges, arguing as to this last count that the amount of damages had not been shown, so Petitioner was guilty of only a misdemeanor (V 3 T 236-239). Petitioner did not mention the burglary charge (count 4). The written motion for judgment of acquittal or for new trial did not state the basis for any of the claims of error made therein (V 1 R 66-67). Petitioner made an argument regarding the burglary count for the first time at the sentencing hearing on November 9, 1998 (V 4 T 327-328).

Petitioner was given concurrent sentences of 30 years in prison as a prison releasee reoffender on counts 2 and 3, 15 years

on count 4, 5 years on counts 6 and 7, and time served on count 8 (V 1 R 115, 118, 120-121, 123-124, 126-127, 129-130, 132).

In an opinion filed on January 19, 2000, the Second District Court of Appeal affirmed Petitioner's burglary, battery, aggravated battery on a law enforcement officer (two counts), and opposing an officer with violence convictions and his prison releasee reoffender sentence, but reversed his felony criminal mischief conviction and remanded the case to the trial court with directions to enter a corrected judgment and sentence for second-degree misdemeanor criminal mischief. *Wingfield v. State*, 25 Fla. L. Weekly D226 (Fla. 2d DCA Jan. 19, 2000). The Second District also certified conflict with *Williamson v. State*, 510 So. 2d 335 (Fla. 4th DCA 1987), *disapproved on other grounds*, *State v. Sanborn*, 533 So. 2d 1169 (Fla. 1988), on the issue of whether Petitioner had committed aggravated battery on the two law enforcement officer victims by ramming the cruiser they were in with the vehicle he was driving.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's statement of facts as essentially accurate with the following additions and corrections:

Erica Riley testified that she believed that the police car was going to stop the truck Petitioner was driving because the police car was so close behind the truck, as if the police were trying to keep the truck in sight (V 2 T 99, 102). After the bang, the truck was pushing the police car backwards (V 2 T 100). The police were telling the men in the truck to stop, but they instead ran off in different directions (V 2 T 100-101). The police chased them (V 2 T 101, 103).

Officer Mark Detrio testified that the hot sheet had a list of vehicles stolen in the previous 72 hours; he did *not* testify that it contained information regarding "missing persons" or "things to watch for" (V 2 T 106, 117). Detrio and his partner, Officer Fortunato, were actively looking for the purple truck (V 2 T 107). They spotted it when it turned behind them, and they made a U-turn and got behind it (V 2 T 107, 118). Shortly after turning right onto Harrison Street, the driver of the truck "floored it," so Detrio knew that the driver of the truck knew that the police "were on him," and Detrio had to accelerate to keep up with him (V 2 T 110-111). Then "the vehicle all of a sudden stopped, was thrown into reverse,...and gunned back at me as fast as he could to close the space crashing into my vehicle" (V 2 T 111). Detrio was

approximately 20-30 feet behind the truck at the time (V 2 T 111). Detrio braked, but was unable to stop; he was moving at no more than 10 mph at the moment of impact (V 2 T 111-112). The truck then began shoving the police car backwards (V 2 T 112). Detrio shifted gears into park, but was still pushed backwards (V 2 T 113). At that point, the officers drew their guns, and Petitioner exited the truck (V 2 T 113). Fortunato chased the fleeing driver while Detrio secured the truck (V 2 T 114). Fortunato saw Petitioner run into a residence (V 2 R 114-115). Detrio knew that Petitioner did not belong in that area because he worked that area and knew some of the people (V 2 T 105, 125). As Detrio was running up to the residence, he saw Petitioner try to exit through the back door (V 2 T 115). Petitioner then tried to slam the door on Detrio, but Detrio got his foot in the door and wrestled Petitioner to the ground just inside the kitchen (V 2 T 115). It took a couple of weeks to get the police car fixed (V 2 T 117).

Officer Fortunato testified that the truck stopped, and Detrio stopped the police car about 20 feet behind the truck, and then the truck went into reverse and slammed into the front of the police car (V 3 T 138). As Fortunato chased Petitioner, he was yelling "police, stop" (V 3 T 139, 148). Fortunato did not actually see Petitioner enter the residence, but he saw the door closing, and no other door was being closed at that time, so he knew that that was the apartment into which Petitioner had fled (V 3 T 139-140).

Fortunato waited at the back of the apartment for backup to arrive before trying to enter the apartment, and the next thing he knew, Detrio and Cpl. Strickland grabbed Petitioner at the front of the apartment (V 3 T 140, 149). Petitioner admitted to Fortunato that he knew he was driving a stolen truck (V 3 T 141, 152). However, Petitioner said that "he took [the truck] for a piece of rock [cocaine]" and further stated "I can't believe the guy reported it stolen" (V 3 T 151).

Neither of the pursuing officers testified that their car closed to within 10-15 feet of the truck after the last turn. Rather, Detrio testified, "after 10, 15 feet after I took my turn [onto Harrison Street], he [Petitioner] floored it" (V 2 T 110).

Carl A. Palmiero, the owner of the truck, testified that the repairs to his vehicle totaled $1100 (V 3 T 154-155). He had never given Petitioner permission to drive his car (V 3 T 155). He *had* given his 43-year-old son Carl George permission to drive the car and had lent it to him at the time in question, but he had not authorized his son to let other people drive it (V 3 T 155-157). His son called him and told him that the truck was stolen, and he told his son to call the police, which his son did (V 3 T 155). Palmiero's son had not given Petitioner permission to drive Palmiero's truck (V 3 T 157).

Toni Hardy testified that, when the truck was backing up into the police car, she heard the tires screeching, which was what

caused her to turn around and look in that direction (V 3 T 164-165). On redirect examination, she clarified that she had not seen the truck at the moment that it first began backing up, but she *had* seen the truck back into the police car (V 3 T 171). Rico was trying to move out of the way when Petitioner pushed him (V 3 T 161, 168). When Toni went inside her house, she saw Petitioner closing the blinds and taking out his braids, and he told her "not to say nothing" (V 3 T 162). Toni was scared, so she just went upstairs (V 3 T 162). Toni never gave Petitioner permission to enter her house (V 3 T 162).

Rico Balcom testified that he went into the neighbor's backyard after Petitioner went by, and when he subsequently entered the house, Petitioner was looking through the window and then looked at Rico (V 3 T 173). Rico ran upstairs and told the other occupants of the house that there was a man downstairs, but no one believed him, so he hid in a closet (V 3 T 173). However, all the girls started running downstairs, and then the police came in (V 3 T 174).

Anthony Hardy testified that he saw Petitioner run across the yard, jump over his wall, open the screen door on his front door (the "heavy" or "big" door was already open), quickly enter, and close the big door and the blinds (V 3 T 183-184, 187-188). Petitioner then told everybody to be quiet, at which point Hardy asked him what was going on (V 3 T 184, 188). Hardy told his

sisters to stay upstairs (V 3 T 185).

Antoinette Casey testified that she, too, saw Petitioner jump over the wall, open the door, and run into the house (V 3 T 192). Petitioner's voice was scary, although it wasn't loud, and he said, "Be quiet; be quiet. I give you $5 or I start stabbing everybody" and "Somebody close the blinds" (V 3 T 192-193). Casey, who, like Hardy, had never seen Petitioner before and had not given him permission to enter, was shocked by Petitioner's threat (V 3 T 193-194). When neither Casey nor Hardy moved, Petitioner started closing the blinds himself (V 3 T 192). At that point, Casey ran upstairs to warn the other occupants of the apartment of the presence of the intruder (V 3 T 192, 195).

Officer Kevin Krupa testified that, when he arrived at the scene, neither of the vehicles involved in the crash was occupied (V 3 T 200). The police car was in park (V 3 T 201).

Cpl. Strickland testified that, moments after he arrived at the scene, he saw Petitioner coming out of an apartment; but Petitioner saw Strickland and Detrio and immediately ran back inside, closing the door just as the two officers ran up to it (V 3 T 207-208). Detrio either kicked or shouldered the door open and ran inside, followed by Strickland (V 3 T 208). Petitioner was found behind the door and apprehended (V 3 T 208). Other officers were inside the house and starting to detain another man who was standing in an opening into the kitchen (V 3 T 212). Petitioner

immediately, even before the police had had a chance to advise him of his rights, informed them that the other man they had detained had no knowledge of the stolen truck (V 3 T 209, 215). After Strickland had advised him of his rights, Petitioner explained that he had rented the truck from two men for $30 worth of rock cocaine but was late returning the truck, saying, "I guess I was a little late" (V 3 T 209-210). It had been 5 days since he was supposed to have returned the truck (V 2 T 210). As to the crash, Petitioner

> said there was a car parked in the middle of the street with someone speaking to the driver. He drove around the vehicle, accelerated, bounced over a speed bump, came to a halt and was trying to get his seat belt off. I asked him if he recalled ramming the police car, and he said that he might have bumped the gear shift lever, he said the gear shift lever was on the floor of the truck, while he was trying to get the seat belt off and he amended that by saying maybe the passenger bumped it ....further in the conversation, he countered that by saying the police car actually ran into him, and that's when he unfastened his seat belt and fled.

(V 3 T 210-211)

Officer Glyder, the accident reconstruction expert, testified that he found acceleration skid marks from the truck's right rear wheel, which was its only drive wheel, and these skid marks were in reverse and originated 9'8" in front of the point of impact (V 3 T 221-223, 225). There was a burn patch where the truck's tire had spun several revolutions before the truck gained enough friction to begin moving backwards (V 3 T 225). Glyder estimated the impact at

approximately 15 mph (V 3 T 223). The skid marks showed that the police car had been pushed backwards but that the car had also pushed the truck forward approximately 2 feet (V 3 T 224). The truck had caught the car above the bumper so that most of the damage was to the headlight and grill areas (V 3 T 224).

Petitioner testified that he had 8-10 prior felony convictions, to which he had pled guilty because he *was* guilty, but he was taking this case to trial because he was not guilty of the instant charges (V 3 T 241-242). On cross-examination, however, he admitted that he had pled no contest, not guilty, to previous criminal charges against him (V 3 T 249). He further admitted that he had been offered probation on all of those cases but had not been offered probation in the instant case (V 3 T 250). Petitioner further testified that he got the crack cocaine he had used to rent the truck from a friend of his whose name he did not recall and whom he did not want to incriminate by disclosing his name (V 3 T 242). Petitioner denied stealing the truck (V 3 T 248). He also denied closing the blinds in Hardy's house or taking the braids out of his hair, testifying that his hair was loose at the time (V 3 T 252). He further denied being late returning the truck: "I just gave them a couple pieces of crack cocaine. He told me to come back whenever" (V 3 T 253).

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal correctly affirmed the trial court's denial of Petitioner's motion for judgment of acquittal on the charges of aggravated battery on a law enforcement officer. The victims' interest in the integrity of their persons includes all those things which are in contact or connected with it, and they were certainly both in contact with the cruiser they occupied. The Fourth District case upon which Petitioner relies itself relies upon a Second District opinion which does *not* support the Fourth District's holding and which actually cites two cases from other states which hold to the contrary.

The Prison Releasee Reoffender Punishment Act does not violate the single subject rule, the separation of powers doctrine, proscriptions against cruel and unusual punishment, due process requirements, equal protection requirements, or proscriptions against ex post facto laws, and it is not unconstitutionally vague. Accordingly, the Act is constitutional.

ARGUMENT

ISSUE I: THE EVIDENCE WAS SUFFICIENT TO SUPPORT Petitioner'S CONVICTIONS OF AGGRAVATED BATTERY ON A LAW ENFORCEMENT OFFICER.

JURISDICTION

Respondent agrees that this Court has jurisdiction to review this issue pursuant to Rule 9.030(a)(2)(A)(iv) and (vi), Florida Rules of Appellate Procedure.

ARGUMENT ON THE MERITS

Petitioner argues that the striking of one motor vehicle with another does not constitute a battery, either simple or aggravated, of any occupant of the struck vehicle, relying on *Williamson*. The *Williamson* panel cited only one case, the Second District's opinion in *Malczewski v. State*, 444 So. 2d 1096 (Fla. 2d DCA), *appeal dismissed*, 453 So. 2d 44 (Fla. 1984), as support for its holding on this issue. However, the *Williamson* panel obviously did not review the out of state cases cited in *Malczewski* at 1099: Two of those cases, *State v. Sudderth*, 184 N.C. 753, 114 S.E. 828 (1922), and *Huffman v. State*, 200 Tenn. 487, 292 S.W. 2d 738 (1956), *overruled in part*, *State v. Irvin*, 603 S.W. 2d 121 (Tenn. 1980)[1], hold contra to *Williamson* on the precise question in issue sub judice, and none

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[1]*Irvin* overruled *Huffman* on the question of whether a defendant could be convicted of multiple counts of homicide or battery where he intentionally struck only one car carrying multiple occupants. *Huffman* answered this question in the negative, but *Irvin* reconsidered this issue and answered the question in the affirmative.

of them agrees with the *Williamson* holding. *Sudderth* also addresses Petitioner's argument that the officers were "hardly jostled" by the impact:

> While in the instant case the prosecutor was not thrown entirely from the car, nor struck in any part of his body, the physical jar necessarily produced by the collision described in evidence, caused by the unlawful use at the time, of defendant's car, is clearly sufficient as stated to justify a conviction for assault and battery.

114 S.E. at 830. Here there was an impact sufficient to cause $1100 worth of damage to the truck and approximately $1500 worth of damage to the police cruiser. Under these circumstances, as in *Sudderth*, the physical jar necessarily produced by the collision was sufficient to justify Petitioner's aggravated battery convictions despite the officers' having been fortunate enough not to have sustained any significant injury. Respondent would note that the victim in *Malczewski* was no more physically injured than the police officers were in the instant case. As the Second District there noted, citing Dean William Prosser's hornbook discussion of the tort of battery, an individual's "'interest in the integrity of his person includes all those things which are in contact or connected with it.' W. Prosser, *Law of Torts* Sec. 9 at 34 (4th ed. 1971)." The victims here were both in contact with their vehicle, and at least one of them, the driver, was holding it (by the steering wheel).

Respondent submits that the Fourth District's holding on this

issue was ill considered, not being supported even by the well-reasoned authority it cited, and should not be followed by this Court.

The concession made by the State in *Parrish v. State*, 589 So. 2d 1043 (Fla. 3d DCA 1991), an unrelated case, is not binding upon the State for all time, and the State refuses to follow that concession in the instant case, even assuming arguendo that the facts in that case, which are not discussed at all in the *Parrish* opinion, are similar to those in this case.

The First District reached the same conclusion in *Clark v. State*, 746 So. 2d 1237 (Fla. 1st DCA 1999), as did the Second District below. It is true that the impact in *Clark* occurred at a speed of 25-35 mph, as did the impact in *Sudderth*, whereas Petitioner's speed at impact here was estimated at only 15 mph. However, regardless of the speed at impact, Petitioner's truck actually pushed the officers' cruiser backwards. Accordingly, Petitioner's argument that the ramming of the officers' cruiser does not constitute a battery merely because neither of them was injured makes no more sense than would the argument that shoving someone and propelling him backwards in the process does not constitute a battery merely because the shoving victim did not suffer physical injury. Neither *Sudderth*, *Clark*, nor *State v. Townsend*, 124 Idaho 881, 865 P. 2d 972 (1993), upon which Petitioner relies, held or even suggested that sufficient impact

must be made to actually harm the victim if the victim is inside a car. Moreover, while *Sudderth* and *Townsend* do not expressly state whether or not the victims were injured as a result of the defendants' vehicles striking their cars, *Clark* does note that there was no evidence that either of the victims was injured. And in *Espinoza v. Thomas*, 189 Mich. App. 110, 472 N.W. 2d 16 (1991), upon which Petitioner additionally relies, the victim apparently suffered no physical injury, and the court placed no reliance whatsoever on the mental distress suffered by the victim in its analysis of the battery issue; rather, the court held that "if all other requisites of a battery against the plaintiff are satisfied, contact with the car the plaintiff occupies is sufficient to establish a battery." 189 Mich. App. at 119, 472 N.W. 2d 21.

ISSUE II: THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, SECTION 775.082(8), FLORIDA STATUTES (1997), IS CONSTITUTIONAL.

JURISDICTION

Respondent agrees that this Court has jurisdiction to review this issue pursuant to its holding in *Jollie v. State*, 405 So. 2d 418 (Fla. 1981).

ARGUMENT ON THE MERITS

Petitioner attacks the Prison Releasee Reoffender Punishment Act, hereinafter referred to as the "Act," on several constitutional grounds. Each will be addressed separately.

<u>Single Subject Violation</u>

The Act does not violate the single subject requirement of the Florida Constitution. This argument has already been rejected by the Fourth District in *Young v. State*, 719 So. 2d 1010 (Fla. 4th DCA 1998). As the court stated in *Young*:

> Chapter 97-239, Laws of Florida, in addition to adding section 775.082(8), also amended sections 944.705, 947.141, 948.06, 948.01 and 958.14. The preamble to the legislation states that its purpose was to impose stricter punishment on reoffenders to protect society. Because each amended section dealt in some fashion with reoffenders, we conclude that the statute meets that test.

Id. at 1012.

The single subject requirement of Article III, Section 6 of the Florida Constitution simply requires that there be "a natural or logical connection" between the various portions of the legislative enactment. Similarly, this Court has spoken of the need for a "cogent relationship" between the various sections of the enactment. *Bunnell v. State*, 453 So. 2d 808, 809 (Fla. 1984) (Fla. 1984). However, "wide latitude must be accorded the legislature in the enactment of laws" and a court should "strike down a statute only when there is a plain violation of the constitutional requirement that each enactment be limited to a single subject...." *State v. Lee*, 356 So. 2d 276, 282 (Fla. 1978). "The act may be as broad as the legislature chooses provided the matters included in the act have a natural or logical connection."

Martinez v. Scanlan, 582 So. 2d 1167, 1172 (Fla. 1991). "[T]he test of duplicity of subject is whether or not the provisions of the bill are designed to accomplish separate and disassociated objects of legislative effort." *Burch v. State*, 558 So. 2d 1, 2 (Fla. 1990), quoting *State v. Thompson*, 120 Fla. 860, 892-93, 163 So. 270, 283 (1935).

A careful reading of the provisions of Chapter 97-239, Laws of Florida, compels the conclusion that the requisite natural or logical connection between the various sections exists. All of the amendments contained in Chapter 97-239 deal with the release, recapture, and resentencing of convicted felons, regardless of the type of release.

Sections 1 and 2 of Chapter 97-239 created the "Prison Releasee Reoffender Punishment Act" by adding a new subsection between old subsections (7) and (8) and renumbering so that the old subsection (8) became subsection (9).[2] Section 3 of Chapter 97-239 added subsection (6) to Section 944.705, Florida Statutes (1997), which new subsection requires that inmates released from prison be given notice of Section 775.082(8). This amendment relates directly to the implementation of Section 775.082(8) and clearly does not violate the single subject rule. Section 4 of Chapter 97-239 amended section 947.141(6) to make mandatory the forfeiture of

[2]The 1998 Legislature added yet another new subsection 8 and renumbered the remaining sections, so that the subsection in issue here is subsection (9) in the 1998 version of Section 775.082.

all gain time or the commutation of time for good conduct earned by a state prisoner while on control or conditional release upon revocation of the conditional or control release for a violation of the terms thereof. This amendment is also clearly related to the subject of released prison inmates. Section 5 of Chapter 97-239 amended section 948.06(1) to allow any law enforcement officer aware of the probationary or community control status of an offender, as well as the offender's probation or community control officer, to arrest such offender if the law enforcement officer has reasonable grounds to believe that the offender has violated his or her probation or community control, and it amended section 948.06(6) to make mandatory the forfeiture of all gain time or the commutation of time for good conduct earned by a state prisoner while on probation, community control, or control release upon revocation of the probation, community control, or control release. Finally, Section 6 of Chapter 97-239 simply reenacts section 958.14 and two subsections of section 948.01, which deal with probation and community control. When an offender is on probation or community control, he is released from or avoids going to prison under certain conditions. Thus, Sections 5 and 6 of Chapter 97-239 also deal with the release of offenders and do not violate the single subject rule.

Chapter 97-239 is a means by which the Legislature attempted to protect society from those who commit crime and are released

into society. The means by which this subject was accomplished involved amendments to several statutes. The fact that several different statutes are amended does not mean that more than one subject is involved. *Burch*, 558 So. 2d at 3.

The interrelated nature of the different provisions of 97-239 presents a situation which is highly analogous to that which was addressed by this Court in *Burch*. Chapter 97-243, Laws of Florida, dealt with many disparate areas of criminal law, which fell into three broad areas: 1) comprehensive criminal regulations and procedures; 2) money laundering; and 3) safe neighborhoods. *Burch*, 558 So. 2d at 3. All of those provisions were deemed to bear "a logical relationship to the single subject of controlling crime, whether by providing for imprisonment or through taking away the profits of crime and promoting education and safe neighborhoods." *Id*. This court stated, "There is nothing in this act to suggest the presence of log rolling, which is the evil that article III, section 6, is intended to prevent. In fact, it would have been awkward and unreasonable to attempt to enact many of the provisions of this act in separate legislation." *Id*. If anything, the connection between the provisions of the act in the instant case is considerably clearer, without having to resort to such broad links as the regulation of crime.

Yet another case providing a strong analogy is *Smith v. Dep't of Insurance*, 507 So. 2d 1080 (Fla. 1987), where numerous disparate

legislative provisions regarding tort reform and insurance law were deemed not to violate the single subject rule. This Court applied a common sense test, rejecting claims that laws dealing with both tort and contractual causes of action could not be addressed in the same legislation. *Id.* at 1087.

In contrast, in one of the cases in which the single subject requirement was held to have been violated, *State v. Johnson*, 616 So. 2d 1 (Fla. 1993), there was no logical connection between career criminal sentencing and the licensing laws for private investigators who repossess motor vehicles. *Id.* at 4. Likewise, in *Bunnell*, there was no connection between the creation of a new substantive offense—obstruction of law enforcement by false information—and the amendment of the statutes governing the Florida Council on Criminal Justice. *Bunnell*, 453 So. 2d at 809.

The common sense test applied by this Court in other cases is clearly satisfied in this case.

<u>Separation of Powers</u>

Petitioner's assertion that the Act violates the separation of powers doctrine has been rejected by the First, Third, and Fifth District Courts of Appeal in *Woods v. State*, 740 So. 2d 20 (Fla. 1st DCA 1999); *McKnight v. State*, 727 So. 2d 314 (Fla. 3d DCA 1999); *Speed v. State*, 732 So. 2d 17 (Fla. 5th DCA 1999); and *Gray v. State*, 742 So. 2d 805 (Fla. 5th DCA 1999). It is well established that the decision to charge and prosecute for crimes is

within the discretion of the prosecutor. *Cleveland v. State*, 417 So. 2d 653 (Fla. 1982). In *Stone v. State*, 402 So. 2d 1330 (Fla. 1st DCA 1981), the court rejected a separation of powers argument from a defendant who sought to reduce his sentence by providing substantial assistance but was refused the opportunity to do so by the prosecutor.

In *Crews v. State*, 366 So. 2d 117 (Fla. 1st DCA 1979), the court rejected a separation of powers argument raised by a defendant who was prosecuted under a state statute instead of a municipal ordinance. The court, recognizing the differences in the possible penalties, remarked that such discretion is inherent in our system of justice, as is the discretion to prosecute an offender under the age of 18 as a juvenile or as an adult, and does not violate the separation of powers doctrine. *Id.* at 119.

Petitioner's position is no different than that of any other person accused of a crime. The prosecutor decides under which statute to proceed, to whom plea bargains should be extended, and which penalty to seek. These acts are inherent in our system of justice. However, the fact that a prosecutor seeks punishment of a given defendant under Section 775.082(8) does not mean that such punishment is automatic. The prosecutor must still satisfy the trial court that the defendant meets the statutory criteria set forth in Section 775.082(8)(a)(1).

As is true in first degree murder cases wherein the State

declines to seek the death penalty, by virtue of the choices provided by the legislature (minimum mandatory sentences), the trial court sometimes has no discretion in sentencing upon conviction because of the minimum mandatory sentence. *Owens v. State*, 316 So. 2d 537 (Fla. 1975). The length of a defendant's sentence is a matter of legislative prerogative. *Leftwich v. State*, 589 So. 2d 385 (Fla. 1st DCA 1991). It is exclusively the legislative domain to determine the penalties for crimes. *State v. Zardon*, 406 So. 2d 61 (Fla. 3d DCA 1981).

As to whether the trial court has any discretion in sentencing a defendant who has been proven by a preponderance of the evidence to fall within the statutory definition of a prison releasee reoffender, there are two schools of thought among Florida's district courts of appeal. The Second and Fourth Districts hold that the trial court retains sentencing discretion when the record supports any of the four exceptions set forth in subsection (d) of the Act, thus saving the Act from invalidation on the basis of a violation of the separation of powers doctrine. *State v. Cotton*, 728 So. 2d 251 (Fla. 2d DCA 1998), *review granted*, 737 So. 2d 551 (Fla. 1999); *State v. Wise*, 744 So. 2d 1035 (Fla. 4th DCA), *review granted*, 741 So. 2d 1137 (Fla. 1999). The First, Third and Fifth Districts, on the other hand, disagree. *Woods*; *McKnight*; *Speed*. They hold that the factors in subsection (d) are intended by the Legislature as considerations for the state attorney and not for

the trial judge and that the trial court has no discretion and must impose the enhanced penalties under the Act if the defendant qualifies and the State requests such sentencing. *Woods* stated, "Our own analysis of the Act leads us to conclude that the legislature's rather clearly expressed intent was to remove substantially all sentencing discretion from trial judges in cases where the prosecutor elects to seek sentencing pursuant to the Act." 740 So. 2d at 22.

However, the Act does not contravene the separation of powers doctrine under either interpretation. As *Woods* noted, "Our supreme court has said that a statute which requires the imposition of a mandatory minimum sentence if certain conditions are met does not violate the separation of powers clause by virtue of the fact that it removes sentencing discretion from the judiciary." *Id*. at 23-24, citing *Scott v. State*, 369 So. 2d 330 (Fla. 1979). Accordingly, *Woods* held that the Act does not violate the separation of powers clause of the Florida Constitution.

<u>Cruel and Unusual Punishment</u>

The Act does not violate the prohibition against cruel and unusual punishment. At least three federal courts have rejected similar challenges to the federal "three strikes" statute. In *United States v. DeLuca*, 137 F. 3d 24,40 n. 19 (1st Cir. 1998), the First Circuit held that the Federal three strikes law does not violate the Eighth Amendment's prohibition against cruel and

unusual punishment. The Seventh Circuit, in *United States v. Washington*, 109 F. 3d 335 (7th Cir. 1997), agreed, holding not only that the Federal three strikes law does not violate constitutional prohibitions against cruel and unusual punishment, but also that it does not violate constitutional prohibitions against ex post facto laws or double jeopardy, nor does it violate the equal protection clause, due process, or the separation of powers doctrine. Again, in *United States v. Farmer*, 73 F. 3d 836 (8th Cir. 1996), the Eight Circuit upheld the federal three strikes law against claims that it constituted cruel and unusual punishment and posed ex post facto, equal protection, and double jeopardy violations.

Petitioner's allegation that the mandatory term of imprisonment violates the cruel and unusual punishment provisions of the state and federal constitutions is amiss. This Court, in *State v. Benitez*, 395 So. 2d 514 (Fla. 1981), rejected a challenge to the mandatory minimum sentences imposed for drug trafficking offenses. In doing so, this Court reiterated,

> This Court has consistently upheld minimum mandatory sentences, regardless of their severity, against constitutional attacks arguing cruel and unusual punishment. See, e.g., *McArthur v. State*, 351 So. 2d 972 (Fla. 1977); *Banks v. State*, 342 So. 2d 469 (Fla. 1976); *O'Donnell v. State*, 326 So. 2d 4 (Fla. 1975). The dominant theme which runs through these decisions is that the legislature, and *not the judiciary*, determines maximum and minimum penalties for violations of the law.

Id. at 518 (emphasis supplied).

A plurality of the United States Supreme Court has rejected the notion that the Eighth Amendment's protection from cruel and unusual punishment extends to the type of offense for which a sentence is imposed; rather, it protects against cruel and unusual *modes* of punishment. *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991). Accordingly, in *Smallwood v. Johnson*, 73 F. 3d 1343 (5th Cir. 1996), the Fifth Circuit held that a defendant's sentence of 50 years imprisonment for misdemeanor theft, enhanced under Texas' habitual offender statute, did not constitute cruel and unusual punishment. In *Rummel v. Estelle*, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980), the United States Supreme Court held that a defendant's sentence of life imprisonment did not constitute cruel and unusual punishment for conviction of obtaining one hundred and twenty one dollars by false pretenses where the sentence was enhanced by a recidivist statute. Therefore, Petitioner has not demonstrated that his enhanced punishment and sentencing is violative of the Eighth Amendment's proscription against cruel and unusual punishment.

<u>Vagueness</u>

There is nothing vague or ambiguous in the Act. The terms that Petitioner questions have nothing to do with giving a defendant notice of what is prohibited under the Act. Those terms deal with the prosecutor's discretion as to whether to seek such an enhanced sentence. In any event, there is nothing vague about

those terms, which have a clear meaning and have been discussed in *McKnight*.

Due Process

The Act does not violate due process. To the extent that Petitioner argues that the Act invites discriminatory and arbitrary application by the state attorney, Respondent relies on its argument *supra* regarding separation of powers and the argument *infra* regarding equal protection.

The victim does not have the power to decide whether or not the Act will be applied in a given case. The victim's desire that a defendant not receive the mandatory prison sentence is not binding on the trial court or the State Attorney. Whether it is the trial court or the State Attorney who has the discretion to decide whether or not to impose the mandatory sanctions under the Act is in dispute among the appellate courts of this state, but one or the other of the two can consider the victim's wishes but is not bound by them. *See Cotton*, 728 So. 2d at 252; *McKnight*, 727 So. 2d at 317.

This is similar, Respondent submits, to the prosecutor's discretion in filing charges. *See State v. Gonzalez*, 695 So. 2d 1290, 1292 (Fla. 4th DCA 1997): "[T]he determination as to whether to continue a prosecution rests with the prosecutor, the arm of the government representing the public interest, and not with the victim of a crime or the trial court."

It is also similar to the trial court's discretion in determining whether to depart from the guidelines. Even though statutory grounds may exist to justify a departure, the court is not required to depart. H*errin v. State*, 568 So. 2d 920, 922 (Fla. 1990), stated:

> We approve the downward departure in Herrin's case. In so doing, we do not suggest that trial judges are under any compulsion to provide downward departures when substance abuse is involved. A trial judge may always impose a sentence within the range of the guidelines. However, in those instances where substance abuse and the amenability to rehabilitation both exist, the judge retains the discretion to impose a sentence below the range of the guidelines.

The Act does bear a reasonable relation to the legislature's objectives. There is no need to resort to legislative history or preamble clauses when the plain language of the Act is clear and unambiguous. The Act applies to "any defendant" who commits an enumerated offense within three years of being released from a state correctional facility. § 775.082(8)(a)1, Fla. Stat. (1997). (See also Respondent's ex post facto argument, *infra*).

<u>Equal Protection</u>

Petitioner claims that the statute violates equal protection. The First District, however, recently rejected this argument in *Woods*, holding that the guarantee of equal protection is not violated when prosecutors are given the discretion to choose which available punishment to apply to convicted offenders. 740 So. 2d

at 25. *See also Barber v. State*, 564 So. 2d 1169 (Fla. 1st DCA 1990), wherein the court stated:

> Barber claims that the statute violates the equal protection clause because nothing in the law prevents two defendants with similar or identical criminal records from being treated differently—one may be classified as a habitual felony offender, while the other might instead be sentenced under the sentencing guidelines....
>
> The United States Supreme Court, however, has held on numerous occasions that the guarantee of equal protection is not violated when prosecutors are given the discretion by law to "habitualize" only *some* of those criminals who are eligible, even though their discretion is not bound by statute....Mere selective, discretionary application of a statute is permissible; only a contention that persons within the habitual-offender class are being selected according to some *unjustifiable* standard, such as race, religion, or other arbitrary classification, would raise a potentially viable challenge....
>
> Similarly, the executive branch is properly given the discretion to choose which available punishments to apply to convicted offenders.

Id. at 1170-1171 (emphasis in original).

Petitioner's equal protection challenge is meritless. The executive branch is properly given the discretion to choose which available punishments to apply to convicted offenders. *See Proffitt v. Florida*, 428 U.S. 242, 254, 96 S. Ct. 2960, 2967 49 L. Ed. 2d 913 (1976) (prosecutor's authority to decide whether to charge a capital offense in the first place and whether to accept a plea to a lesser offense does not render Florida's capital punishment

scheme unconstitutional).

Wooten v. State, 332 So. 2d 15 (Fla. 1976), upheld the Legislative decision to require mandatory adjudication in drunk driving cases against an equal protection challenge. In doing so, this Court stated that "the requirement of mandatory adjudication manifests, if anything, a legislative intent to *ensure equal protection of the laws*." *Id*. at 17 (emphasis in original). The purpose of the statute in issue here is to provide uniform punishments and to punish recent releasees from prison to the fullest extent of the law. "The burden is on the challenger to demonstrate that the law does not bear a reasonable relationship to a proper state objective." *State v. Bussey*, 463 So. 2d 1141, 1144 (Fla. 1985). Protection of society for a longer term from offenders who reoffend shortly after their release from prison than from others who commit similar offenses is a rational state purpose. Accordingly, the statute is constitutional and is not a violation of equal protection.

Ex Post Facto

Petitioner asserts that the statute is designed to be applied only prospectively and that its application to offenders who were released prior to its effective date, such as himself, constitutes an ex post facto law, which violates Article I, Section 10 of the Florida Constitution. As Petitioner acknowledges, this argument has been rejected by the Fourth District in *Plain v. State*, 720 So.

2d 585, 586 (Fla. 4th DCA 1998), *review denied*, 727 So. 2d 909 (Fla. 1999), wherein the court stated:

> the Act increases the penalty for a crime committed after the Act, based on release from prison resulting from a conviction which occurred prior to the Act. It is no different than a defendant receiving a stiffer sentence under a habitual offender law for a crime committed after the passage of the law, where the underlying convictions giving the defendant habitual offender status occurred prior to the passage of the law. Under those circumstances habitual offender laws have been held not to constitute ex post facto law violations.

Plain was followed by the 5th District in *Gray*.

Beazell v. Ohio, 269 U.S. 167, 169-170, 46 S. Ct. 68, 70 L. Ed. 216, 217 (1925), summarized the characteristics of an ex post facto law:

> It is settled, by decisions of this court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

Florida's ex post facto law has been interpreted similarly. *Wilensky v. Fields*, 267 So. 2d 1, 5 (Fla. 1972). The critical question is whether the new provision imposes greater punishment for an offense after the commission of the offense, not merely whether it increases a criminal sentence. *See Greene v. State*, 238

So. 2d 296 (Fla. 1970) (statute prohibiting bail on appeal for offenders with prior felony convictions held ex post facto where the offense in question on appeal was committed prior to the effective date of the statute); *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981) (statute reducing allowable gain time held ex post facto where the offense for which the prisoner was receiving gain time was committed prior to the effective date of the statute).

In this case, the new provision does *not* impose greater punishment upon Petitioner for an offense committed prior to the effective date of the statute. The statute became effective May 30, 1997. The instant offenses were committed on May 26, 1998. The operative conduct which triggers the statute is not Petitioner's release from prison, but his commission of the new offenses. *Perkins v. State*, 583 So. 2d 1103, 1105 (Fla. 1st DCA 1991). As stated by this Court in *Cross v. State*, 96 Fla. 768, 782, 119 So. 380, 385 (1928), "But for the commission of the subsequent offense, the enhanced penalty would not be imposed." Petitioner's argument is no different, in substance, from the ex post facto attacks made on the habitual offender and habitual violent offender statutes, which have been rejected, *Raulerson v. State*, 609 So. 2d 1301 (Fla. 1992).

Tangential to his ex post facto argument, Petitioner also asserts that the legislature did not intend this act to apply to

those who were released from prison prior to its effective date. This argument belies the plain language of the statute. Section 775.082(8), Florida Statutes (1997), which sets forth mandatory minimum sentences for certain reoffenders previously released from prison, defines a "Prison releasee reoffender" as "any defendant who commits or attempts to commit" one of the felonies enumerated in subsection(8)(a)1 "within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor."

Subsection(8)(d)1 explains that it is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in that subsection unless certain specified circumstances exist. Petitioner does not contend that any of the exceptions set forth in the statute pertain to him.

This Court has held that "the plain meaning of statutory language is the first consideration of statutory construction." *Capers v. State*, 678 So. 2d 330, 332 (Fla. 1996). There is no room for alternative construction of a statute if the statute's meaning is plain on its face. *State v. Harvey*, 693 So. 2d 1009, 1010 (Fla. 4th DCA 1997). In the instant case, the meaning of the statute is plain on its face, and there is no room for Petitioner's alternative construction.

Petitioner contends that the language of the Act requires a

finding that it be applied only to those offenders who are released subsequent to its effective date. However, Petitioner has not pointed to any specific language within the Act which indicates this, nor has Petitioner pointed to any specific language which is ambiguous and subject to differing constructions. Contrary to Petitioner’s assertion, under the plain language of the Act, the Act is applicable to “any defendant” who commits an enumerated felony within three years of being released from a state correctional facility.

Petitioner tries to bolster his argument that the statute is ambiguous and subject to differing constructions by relying on legislative history. However, the legislative history of the statute is irrelevant here because the wording of the statute is clear and unambiguous. *Streeter v. Sullivan*, 509 So. 2d 268, 271 (Fla. 1987).

Moreover, even if this Court does resort to rules of statutory construction, there is no indication that the Legislature intended that the Act apply only to defendants released after the effective date of the statute. First, Petitioner relies on the legislative history of the Act, which indicates that the law was enacted because of recent court decisions mandating early release of violent felony offenders. Even if the U.S. Supreme Court’s decision in *Lynce v. Mathis*, 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997), which is not specifically referred to in the Act,

did prompt the Legislature to address the problem of releasee reoffenders, there is no indication that the Legislature meant to restrict the application of the statute only to those who were released as a result of *Lynce*.

Furthermore, Petitioner has failed to acknowledge that the Legislature also indicated that the Act was passed for two other reasons, those being that "the people of this state and the millions of people who visit our state deserve public safety and protection from violent felony offenders who have previously been sentenced to prison and who continue to prey on society by reoffending" and that "the Legislature finds that the best deterrent to prevent prison releasees from committing future crimes is to require that any releasee who commits new serious felonies must be sentenced to the maximum term of incarceration allowed by law, and must serve 100 percent of the court-imposed sentence." Chapter 97-239, Laws of Florida. In fact, the face of the statute indicates that the Legislature intended that all reoffenders would be subject to the provisions of the Act for crimes committed subsequent to the Act's effective date, and under rules of statutory construction, legislative intent is determined primarily from the plain language of the statute. *State v. Cohen*, 696 So. 2d 435, 438 (Fla. 4th DCA 1997).

Next, Petitioner relies on the language of Section 944.705(6), Florida Statutes (1997), as indicative of the Legislature's intent

that the statute only apply to those released after the effective date of the statute. However, Section 944.705(6) does not indicate a legislative intent that Section 775.082(8), Florida Statutes (1997), is to be applied only to prisoners released after its effective date. Section 944.705(6) merely provides that, upon release, all inmates are to be warned that, if they commit a felony listed in Section 775.082(8), Florida Statutes (1997), within three years of release, they will be subject to sentencing pursuant to the provisions of that section.

The fact that prisoners who are currently being released are to be given specific notice of the statute in issue here does not dictate that those who were released prior to the effective date of the statute are exempt from the statute. On the contrary, Section 944.705(6)(b) expressly provides that failure of the Department of Corrections to provide the notice to a given individual does not prohibit sentencing him or her pursuant to section 775.082(8). Thus, the notice provision of section 944.705(6) in no way indicates any intent on the part of the Legislature that Section 775.082(8)(a)1 is to be applied only to those prisoners released after the effective date of the statute.

Because the language of Section 775.082(8), Florida Statutes (1997), is not susceptible to different constructions, there is no need for this Court to invoke the principle set forth in Section 775.021(1), Florida Statutes (1997), that statutes susceptible of

differing constructions must be construed in a manner most favorable to the accused. Under the clear language of Section 775.082(8), Florida Statutes (1997), Petitioner, who meets the definition of a "prison releasee reoffender" and committed an enumerated felony after the effective date of the statute, was properly sentenced under the provisions of that statute.

CONCLUSION

Respondent respectfully requests that this Honorable Court approve the opinion of the district court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Raymond Dix, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000, this 31st day of March, 2000.

____
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